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No. 97-1087

In the Supreme Court of the United States

OCTOBER TERM, 1997

GTE MIDWEST INCORPORATED, CROSS-PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission reasonably construed 47 U.S.C. 251(c)(3), which entitles "any requesting telecommunications carrier" to obtain access to unbundled elements of the incumbent carrier's network, to permit requesting carriers to obtain access to such elements as a means of providing telecommunications services whether or not they have constructed some facilities of their own.

2. Whether the Commission reasonably construed the Telecommunications Act of 1996 to require incumbent carriers to provide new entrants with nondiscriminatory access to operational support systems, operator services, and similar facilities and functionalities that are necessary for the efficient provision of telecommunications services.

3. Whether the Commission reasonably determined the manner and extent to which the provisions of 47 U.S.C. 251(d)(2) affect an incumbent carrier's general unbundled access obligations under 47 U.S.C. 251(c)(3).

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OPINION BELOW

The principal opinion of the court of appeals (Pet. App. 1a-67a), as amended by the court's order on rehearing (*id.* at 68a-72a), is reported at 120 F.3d 753. The First Report and Order of the Federal Communications Commission (FCC) is reported at 11 FCC Rcd. 15,499 (1996). Excerpts of the First Report and Order are printed in the appendix to the petition (Pet. App.) in *AT&T Corp. et al.* v. *Iowa Utilities Board et al.*, No. 97-826 (filed Nov. 17, 1997), and in the appendix to this cross-petition (Cross-Pet. App.).

JURISDICTION

The principal judgment of the court of appeals was entered on July 18, 1997. A subsequent order, granting rehearing in part and denying rehearing in part, was issued on October 14, 1997. The present cross-petition was filed on December 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 19, 1997, the FCC and the United States filed a petition for certiorari (Fed. Pet.) in *Federal Communications Commission, et al.* v. *Iowa Utilities Board, et al.*, No. 97-831. That petition, along with the petitions of several other parties, seeks review of, *inter alia*, the court of appeals decision at issue in this conditional cross-petition. Our petition sets forth the statutory scheme and the procedural background of this case, see Fed. Pet. 2-11, and we incorporate that discussion by reference. On December 24, 1997—six days before this cross-petition was filed—several Regional Bell Companies filed a separate conditional cross-petition for a writ of certiorari in the same case. See *Ameritech Corporation, et al.* v. *Federal Communications Commission, et al.*, No. 97-1075 (Regional Bell Cross-Pet.). To permit expeditious review of the underlying judgments, we filed our response to that cross-petition (Fed. Response to Regional Bell Cross-Pet.) on December 31, 1997.

The questions presented in the Regional Bell cross-petition and in this cross-petition concern various aspects of the Commission's implementation of 47 U.S.C. 251(c)(3), which grants new entrants in the local telephone market rights of "nondiscriminatory access to [the incumbent's] network elements on

an unbundled basis." Our response to the Regional Bells' cross-petition closely examines Section 251(c)(3), its relationship to the "resale" provision of 47 U.S.C. 251(c)(4), the definition of "network element" contained in 47 U.S.C. 153(29), and the court of appeals' disposition of the Commission's Rule 315(b), 47 C.F.R. 51.315(b). We incorporate that discussion by reference.[1]

1. The first question presented in this cross-petition is essentially identical to the first question presented in the Regional Bell cross-petition: each addresses the Commission's refusal to read into Section 251(c) a "facilities ownership" limitation that would bar new entrants from providing telecommunications services entirely through the use of an incumbent's unbundled elements. We discuss the procedural history of that issue in our response (at 3-4, 5-6) to the Regional Bell cross-petition.

2. a. The second and third questions presented in this cross-petition address two Commission determinations that the Regional Bells do not squarely challenge in their principal cross-petition. In the first of those determinations, the Commission addressed a new entrant's rights of access under Section 251(c)(3) to facilities, functions, or capabilities—

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[1] The day before this brief was filed, we received a third conditional cross-petition filed by a Regional Bell Company that had not joined in the principal Regional Bell cross-petition. See *U S WEST, Inc.* v. *Federal Communications Commission, et al.*, No. 97-1099 (filed Jan. 5, 1998). That cross-petition presents three questions, the first two of which are identical to the questions presented in the Regional Bell cross-petition, and the third of which is identical to the third question presented in this cross-petition. We will briefly respond to the *U S WEST* cross-petition in a separate filing.

such as operational support systems—that are not *directly* used in the transmission of telephone calls but that are nonetheless an integral part of the efficient provision of telecommunications services to consumers.

As our petition discusses, the local competition provisions of the 1996 Act entitle new entrants to use an incumbent local exchange carrier's (LEC's) network in providing competing services, for example through unbundled access or resale. See Fed. Pet. 5. An incumbent retains ultimate physical control over that network, however, even when competing carriers make use of it through one of those statutory means. See, *e.g.*, First Report and Order, ¶ 258 ("[t]his concept of network elements * * * does not alter the incumbent LEC's physical control or ability or duty to repair and maintain network elements"). The incumbent therefore keeps detailed information in various databases about the underlying facilities serving specific customers, including customers who have chosen other carriers as providers of local services.

Those databases and their associated programs—which are essential to providing quick and efficient maintenance, repair, ordering, billing, and other services—are known as "operational support systems," or OSS. Without access to those systems, a competing LEC would have to resort, at best, to slower and more cumbersome means of obtaining essential network information, processing customer requests, and securing maintenance and repair services. The new entrant might find it impossible, for example, to conduct basic customer transactions (such as providing an installation date) in a single call. As the Commission determined, that disparity in

responsiveness would keep the competitor from serving its customers as efficiently as the incumbent could serve them, and it would therefore put the competitor at a clear competitive disadvantage. See Cross-Pet. App. 3a-5a.

On three independent grounds, the Commission determined that Congress intended to ensure a new entrant's nondiscriminatory access to OSS. Cross-Pet. App. 4a. The first two of those grounds derive from the Act's two-part definition of "network elements":

> First, operations support systems themselves can be characterized as "databases" or "facilit[ies] . . . used in the provision of a telecommunications service," and the functions performed by such systems can be characterized as "features, functions, and capabilities that are provided by means of such facilit[ies]." Second, the information contained in, and processed by operations support systems can be classified as "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

Ibid. (quoting 47 U.S.C. 153(29)). The Commission's third justification for requiring nondiscriminatory access to OSS, however, rests not on that definition, but on a wholly separate consideration: "[N]ondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a 'term or condition' of unbundling *other* network elements under section 251(c)(3), or resale under section 251(c)(4)." *Ibid.* (emphasis added). The Commission concluded: "under *any* of these interpretations,

operations support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions." *Ibid.* (emphasis added).

The Commission separately determined that an incumbent LEC's nondiscriminatory access obligations extend as well to directory assistance and "operator services," a category that includes not just live operators but also (and increasingly) automated functions such as the handling of calling card calls. See Cross-Pet. App. 8a. The Commission observed, among other things, that directory assistance and operator services are part of an incumbent's "facilities and functionalities" for the provision of telecommunications services, and that access to them is "important to facilitate competition in the local exchange market." *Ibid.*

b. In the second determination at issue here—the subject of the third question presented in this cross-petition—the Commission issued rules implementing Section 251(d)(2), which provides:

> In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—
>
> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. 251(d)(2). As a threshold matter, the Commission observed that, by its terms, Section 251(d)(2) sets forth "minimum considerations that [it] shall take into account in evaluating unbundling requirements," and that those considerations "give us the discretion to limit the general obligation imposed by subsection 251(c)(3), but they do not require us to do so." First Report and Order, ¶ 286 (reprinted in the Appendix to this brief).

The Commission determined that access to a proprietary element is "necessary" within the meaning of Section 251(d)(2)(A) if the element "is a prerequisite for competition." First Report and Order, ¶ 282 (reprinted in the Appendix to this brief). The Commission added that depriving new entrants of access to such elements would often "significantly impair[] or thwart[]" a new entrant's ability to compete. *Ibid.* The Commission also determined that, "to the extent new entrants seek additional elements beyond those" specifically identified elsewhere in the Commission's rules, "section 251(d)(2)(A) allows the Commission and the states to require the unbundling of [proprietary] elements" unless "a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network." Cross-Pet. App. 1a.[2]

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[2] The Commission separately interpreted the term "impair," as it appears in Section 251(d)(2)(B), to mean "to make or cause to become worse; diminish in value." First Report and Order ¶ 285 (reprinted in the Appendix to this brief). It determined that, in general, "an entrant's ability to offer a telecommunications service is 'diminished in value' if the quality of the service the entrant can offer, absent access to the requested

The Commission specifically "decline[d] to adopt the interpretation of section 251(d)(2)(A) advanced by some incumbents that incumbent LECs need not provide proprietary elements if requesting carriers can obtain the requested proprietary element from a source other than the incumbent." Cross-Pet. App. 2a. The Commission explained that "[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." *Ibid.*

c. The court of appeals upheld each of the Commission determinations at issue here. First, the court affirmed the Commission's conclusion that the 1996 Act requires unbundled access not just to transmission facilities and related functions, but also to OSS, operator services, and other facilities, features, and functions used in the efficient provision of commercial telecommunications. Pet. App. 41a-45a. The court observed that, to fall within the statutory definition of "network element," a facility or function need only be "'used in the provision of a telecommunications *service*,'" which the Act defines as "'the offering of telecommunications for a fee directly to the public.'" *Id.* at 42a (quoting 47 U.S.C. 153(29), 153(46)). "Given this definition," the court held, "the offering of telecommunications services encompasses more than just the physical components directly involved in the transmission of a phone call and includes the technology and information used to facilitate ordering, billing, and maintenance of phone

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element, declines and/or the cost of providing the service rises." *Ibid.*

service—the functions of operational support systems." *Id.* at 43a. The court added that "operational support systems alternatively qualify as network elements" under the *second* sentence of 47 U.S.C. 153(29), "because the information and databases of these systems constitute features, functions, and capabilities that are provided through the use of software and hardware that is used in the commercial offering of telecommunication services to the public." *Ibid.*

The court also determined that "operator services and directory assistance qualify as features, functions, or capabilities that are provided by facilities and equipment that are used in the provision of telecommunication services," and therefore are "network elements that are subject to unbundling." Pet. App. 44a. It explained that "[t]he commercial offering of phone services to the public and the specific transmission of phone calls between locations implicates the use of operator services and directory assistance." *Ibid.*

The court separately upheld the Commission's interpretation of the "necessary" and "impair" standards of Section 251(d)(2). Pet. App. 47a-50a. In so doing, the court rejected the claim, renewed in this cross-petition, that an element cannot be "necessary" if a requesting carrier could gain access to a similar facility or functionality from some source other than the incumbent LEC. *Id.* at 47a-48a. The court observed that "[a]llowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually. The Act, however, provides

for unbundled access to incumbent LECs' network elements as a way to jump-start competition." *Id.* at 48a.

DISCUSSION

Cross-petitioner presents three questions for review, the first of which is essentially identical to the first question presented in the cross-petition of the Regional Bell Companies. For the reasons discussed in our response to the Regional Bell cross-petition, we do not oppose certiorari on that issue if, as we urge, this Court grants certiorari on the second question presented in our petition in No. 97-831. The remaining two questions in this cross-petition, however, do not merit further review.

1. Section 251(c)(3) compels incumbent LECs to make unbundled network elements available "to *any* requesting telecommunications carrier for the provision of a telecommunications service" (emphasis added), which the Act elsewhere defines as "the offering of telecommunications for a fee directly to the public * * * regardless of the facilities used," 47 U.S.C. 153(46). Like the Regional Bells, however, cross-petitioner GTE challenges the Commission's decision not to read into Section 251(c)(3) a "facilities ownership" limitation that would prevent any new entrant from exercising its rights under that provision until after it had constructed facilities of its own. As we explain in our response (at 8-16) to the Regional Bell cross-petition, that proposed limitation is irreconcilable with the text and purposes of Section 251(c)(3), and the various articulated policy reasons for inventing such a limitation—concerns about "arbitrage," universal service, and efficient, cost-based

competition—are unpersuasive.[3] Rather than repeat that discussion here, we incorporate it by reference.

As in our response to the Regional Bell cross-petition, however, we agree that, as clarified in the order on reconsideration (see Pet. App. 70a-71a), the court of appeals based its rejection of a "facilities ownership" rule not just on the text of Section 251(c)(3)—which alone would be enough to support the court's holding—but also on policy considerations that, in part, presupposed the continued invalidity of Rule 315(b), 47 C.F.R. 51.315(b).[4] The court therefore char-

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[3] Like the Regional Bells, cross-petitioner GTE argues that it is necessary to read countertextual limitations into Section 251(c)(3) to ensure the future of universal service. Whereas the Regional Bells do not even cite 47 U.S.C. 254—the provision that Congress enacted precisely to accommodate universal-service concerns in the new era of efficient, cost-based competition (see Fed. Response to Regional Bell Cross-Pet. 11-12)—GTE relegates its discussion of that provision to a two-sentence footnote in the background section of its cross-petition (at 11 n.5). In that footnote, GTE appears to argue that its proposed limitation on Section 251(c)(3)—which of course would be permanent—is necessary to ease the transition into the new universal-service regime, which is scheduled, under the Commission's timetable, to begin taking effect in less than a year. As private petitioners have observed, any such argument is implausible. See Response of AT&T Corp. et al., at 15-16, in *Ameritech Corp.* v. *FCC*, No. 97-1075. Among other considerations, there is no local competition that could threaten existing universal-service subsidies in the near term, and, at all events, any interim problems should be addressed by interim regulatory solutions, not by permanently binding misinterpretations of federal statutes.

[4] Rule 315(b) bars incumbent LECs from pulling apart previously joined network elements for the sole purpose of inflicting anti-competitive costs on new entrants that request access to those elements. See Fed. Pet. 25-28; Reply Br. in Support of

acterized its disposition of the first question presented in the cross-petition as related to its disposition of the second question presented in our petition. For that reason, we do not oppose cross-petitioner's conditional request to consider the two issues together. See Fed. Response to Regional Bell Cross-Pet. 15-16.

2. In the final two questions presented here, cross-petitioner addresses quite different aspects of a new entrant's unbundled access rights under Section 251(c)(3) and proposes new ways to eviscerate those rights to make unbundled access a less attractive entry option. Cross-petitioner does not argue that those issues are independently certworthy, but it insists that they are somehow bound up in the court of appeals' invalidation of Rule 315(b), and that review of the latter would require review of the former. The court of appeals perceived no such linkage, however, and there is none. See pp. 19-20, *infra*. Moreover, each of cross-petitioner's claims lacks substantive merit.

a. In the second question presented, cross-petitioner GTE argues that the term "network element," as defined in 47 U.S.C. 153(29), should be narrowly construed to include only "the essential facilities of the call-routing network." Cross-Pet. 22. Through that definition, cross-petitioner seeks to exclude OSS from the scope of Section 251(c)(3). That argument fails even on its own terms, because OSS is, in fact, indispensable to the successful operation of any

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Fed. Pet. 8-10; Fed. Response to Regional Bell Cross-Pet. 5, 14-15.

modern "call-routing network." See pp. 4-5, *supra*.[5] To the extent that cross-petitioner suggests that Section 153(29) confines the term "network element" to transmission facilities (see Cross-Pet. 22), that is simply incorrect, as we discuss below; indeed, that provision explicitly embraces OSS. Finally, even if cross-petitioner's construction of Section 153(29) were correct, its efforts to exclude OSS from an incumbent LEC's obligations of nondiscriminatory access would still be unworthy of review, because cross-petitioner has failed to challenge an adequate and independent basis for the Commission's determination.

To begin with, and for two separate reasons, OSS falls within the scope of "network element" as that term is defined in Section 153(29). First, under the first sentence of that provision, operational support systems readily qualify as "network elements" because they are "facilit[ies] or equipment used in the provision of a telecommunications service," as both the Commission and the court of appeals recognized. Cross-petitioner's unexplained assertion that "facilit[ies] or equipment" can only be "physical piece[s] of hardware" (Cross-Pet. 21) is at odds with the ordinary meaning of those terms. See, *e.g.*, *Random House Dictionary of the English Language* 690 (2d ed. 1987) (defining "facility" as "something designed, built, installed, etc. to serve a specific function affording a convenience or service" or "something that

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[5] As discussed above, access to OSS is necessary to enable new entrants to obtain network information as efficiently as the incumbent can obtain it and to ensure efficient maintenance of and modifications to that network. Such access does not, as cross-petitioner suggests (Cross-Pet. 24), enable new entrants to appropriate "any business skills LECs had perfected."

permits the easier performance of an action, course of conduct, etc."). In any event, the Commission's resolution of any ambiguity in those terms, as well as its determination that OSS falls within their scope, is entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

Moreover, even if operational support systems were for some reason not properly characterized as "facilit[ies] or equipment used in the provision of a telecommunications service," they would still fall within the scope of Section 153(29)'s definition of "network elements." The second sentence of that provision embraces any "features, functions, and capabilities that are provided by means of such facility or equipment"—for example, the hardware and software associated with OSS—and therefore specifically "includ[es] subscriber numbers, databases * * * and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. 153(29); see Pet. App. 43a. Cross-petitioner's approach would exclude several of those specifically listed items—such as "databases" and billing information—from the scope of the network elements to which competitors may gain efficient, nondiscriminatory access, and that itself is conclusive evidence that cross-petitioner's approach is wrong. See *id.* at 43a-44a.

In any event, even if there were some merit to cross-petitioner's interpretation of Section 153(29), the second question presented in the petition would still not merit this Court's review. As in the court of appeals, cross-petitioner has failed to challenge or even mention the FCC's third ground for requiring

nondiscriminatory access to OSS: the Commission's determination that "nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a 'term or condition' of unbundling *other* network elements under section 251(c)(3), or resale under section 251(c)(4)." Cross-Pet. App. 4a (emphasis added); see also Pet. App. 292a-293a. For example, a new entrant's access to elements used in the transmission of telephone calls cannot be "nondiscriminatory," as required by Section 251(c)(3), if denial of access to an incumbent's OSS prevents the new entrant from providing service to its customers, through those elements, as efficiently as the incumbent can provide service to its customers. Because the Commission explicitly relied upon that consideration as an independent ground for its decision, see Cross-Pet. App. 4a, cross-petitioner's challenge to the *other* two grounds (involving interpretation of Section 153(29)) is insufficient to challenge the decision itself. For that reason alone, cross-petitioner's challenge to the Commission's disposition of OSS is improperly presented for this Court's review. See generally *Carnegie Natural Gas Co.* v. *FERC*, 968 F.2d 1291, 1294 (D.C. Cir. 1992) (noting that agency decision must be sustained if any one of the independent grounds supporting it is valid).

Finally, the Commission reasonably determined that directory assistance and "operator services" are network elements, see Cross-Pet. App. 8a, and the court of appeals was correct in upholding that determination, see Pet. App. 44a. Those aspects of telephone service, which increasingly take the form of automated programs (see p. 6, *supra*), are essential to customers' use of the telephone network and easily

fall within Section 153(29)'s two-part definition of "network element." And an element is an element whether or not it can also be characterized as "a separate service that incumbents provide their customers" (Cross-Pet. 24). As the court of appeals observed, "[w]hile subsection 251(c)(4) does provide for the resale of telecommunications services, it does not establish resale as the exclusive means through which a competing carrier may gain access to such services," and thus "a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale." Pet. App. 45a.

b. The third question presented in the cross-petition concerns the Commission's determination that the "necessary" and "impair" standards of Section 251(d)(2) do not exempt an incumbent LEC from its general obligation to provide unbundled access to network elements in circumstances in which a new entrant could theoretically obtain access to such elements outside the incumbent LEC's network, albeit on different terms. Cross-petitioner's challenge to that determination is without merit. As an initial matter, cross-petitioner nowhere addresses the Commission's threshold determination that Section 251(d)(2) sets forth "minimum considerations that [it] shall take into account in evaluating unbundling requirements," and that while those considerations "give us the *discretion* to limit the general obligation imposed by subsection 251(c)(3), * * * they do not *require* us to do so." First Report and Order, ¶ 286 (reprinted in the Appendix to this brief) (emphasis added); see also *Time Warner Entertainment Co.* v. *FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (when "statute by its terms merely requires the Commission to

consider" certain factors, "[t]hat means only that it must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it") (internal quotation marks omitted), cert. denied, 516 U.S. 1112 (1996). Cross-petitioner's failure to address that point is itself a sufficient basis for denying review on the third question presented here.

In any event, the Commission reasonably interpreted the terms "necessary" and "impair." See pp. 7-8 & n.3, *supra*. In particular, "[a]lthough the Commission's definition [of "necessary"] is broader than [cross-petitioner's], it is not toothless," Pet. App. 49a, and it comports with the accepted definition of that term in analogous contexts. See Pet. App. 48a-49a & n.31. Moreover, the Commission properly rejected arguments, renewed here, that the inquiry into whether a network element is "necessary" for effective competition turns on whether a requesting carrier could obtain it from an alternative source. The Commission observed that, "[a]s a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach." Cross-Pet. App. 2a. For that reason, the rule that cross-petitioner seeks—an exemption from general unbundling obligations under Section 251(c)(3) even when new entrants *would* prefer access to the incumbent's elements over alternative sources—would have the effect of compelling new entrants to turn to more expensive or less efficient means of obtaining the elements in question. That result would "inhibit new entry and thus restrict the potential for meaningful competition, which would under-

mine the procompetitive goals of the 1996 Act." *Ibid.* Indeed, cross-petitioner's position "would nullify section 251(c)(3) because, in theory, any new entrant could provide all of the elements in the incumbent's networks. Congress made it possible for competitors to enter local markets through the purchase of unbundled elements because it recognized that duplication of an incumbent's network could delay entry, and could be inefficient and unnecessary." *Ibid.*; see also Pet. App. 48a (agreeing with Commission that "[a]llowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually").

Cross-petitioner finally contends (Cross-Pet. 26) that "[p]reserving an incumbent's exclusive rights to its proprietary innovations is critical for maintaining incentives to continue investing in new developments." As the Commission determined, however, in a passage that cross-petitioner does not address, "the threat to competition from [a more restrictive view of Section 251(d)(2)] would far exceed any costs to consumers resulting from reduced innovation by the incumbent LEC," and "the procompetitive effects of our conclusion generally will stimulate innovation in the market, offsetting any hypothetical reduction in innovation by the incumbent LECs." First Report and Order, ¶ 282; see also Pet. App. 49a-50a (affirming Commission's reasoning). The court of appeals correctly deferred both to that specific determination (*ibid.*) and, more generally, to the Commission's entirely reasonable interpretation of Section 251(d)(2). See *Chevron, supra.*

c. Although the court of appeals based its rejection of cross-petitioner's proposed "facilities ownership" limitation in (small) part on its invalidation of Rule 315(b), see pp. 11-12, *supra*, it did not similarly view its disposition of either the second or the third questions presented in this cross-petition as related to that separate issue. Instead, it rejected cross-petitioner's arguments on those questions on entirely independent grounds. Cross-petitioner nonetheless contends that, at some level of abstraction, those second and third questions *are* somehow related to the court of appeals' invalidation of Rule 315(b), and it therefore suggests that this Court should not consider the second question presented in our petition without considering these additional questions as well.

We disagree. The only common element linking cross-petitioner's primary challenge to Rule 315(b) and its quite distinct challenges on the second and third questions presented here is that all three challenges are countertextual efforts to drain Section 251(c)(3) of its intended competitive effects, albeit in vastly different ways. To be sure, any countertextual limitation on the competitive benefits of unbundled elements necessarily makes alternative entry options (such as resale) more attractive to new entrants, but that does not make each such limitation related to every other such limitation as a matter of statutory analysis. The unbundled access and resale provisions have independent meaning, each on its own terms; nothing in the 1996 Act authorizes courts to create artificial economic incentives for new entrants to choose one statutory option over the other when

either is available. See generally Fed. Response to Regional Bell Cross-Pet. 12-14, 16-17.[6]

Nonetheless, if this Court is uncertain about whether it should grant certiorari with respect to any of the additional issues presented either in this or in the Regional Bells' cross-petition, the proper course is not to resolve that uncertainty by denying review of the court of appeals' erroneous and highly consequential invalidation of Rule 315(b). (That is a result that cross-petitioner, which well recognizes the centrality of Rule 315(b) to the prospects for local competition, conspicuously hopes to induce. See Cross-Pet. 15 & n.6.) Instead, the proper course is to grant certiorari on the questions presented in our petition and on any additional question as to which this Court may be in doubt.

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[6] It is noteworthy that the only question that this cross-petition and the Regional Bell cross-petition present in common is the one on which we have acquiesced, even though GTE and the Regional Bells, as incumbent LECs, have extremely similar interests for present purposes. Compare Regional Bell Cross-Pet. 22-24 (challenging Commission's determination that Act's definition of "network elements" includes "vertical switching features" such as call-waiting and caller identification). If the proper interpretation of Section 251(d)(2) and the status of OSS and operator services were truly interrelated with the second question presented in our cross-petition, those issues presumably would have appeared in the Regional Bells' conditional cross-petition as well.

CONCLUSION

We do not oppose the cross-petition with respect to the first question presented if the Court grants review of the second question presented in our petition in No. 97-831. The cross-petition should be denied with respect to its second and third questions presented.

Respectfully submitted.

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JANUARY 1998

APPENDIX

From *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, FCC 96-325 (Aug. 8, 1996) (some footnotes omitted):

282. Section 251(d)(2)(A) requires the Commission and the states to consider whether access to proprietary elements is "necessary." "Necessary" means, in this context, that an element is a prerequisite for competition. We believe that, in some instances, it will be "necessary" for new entrants to obtain access to proprietary elements (*e.g.*, elements with proprietary protocols or elements containing proprietary information), because without such elements, their ability to compete would be significantly impaired or thwarted.[] Thus, as an initial matter, we decline to adopt a general rule, as suggested by some incumbents, that would prohibit access to such elements, or make access available only upon a carrier demonstrating a heavy burden of need. We acknowledge that prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative services. We are not persuaded, however, that this is a sufficient reason to prohibit generally the unbundling of proprietary elements, because the threat to competition from any such prohibition would far exceed any costs to consumers resulting from reduced innovation by the incumbent LEC.[] Moreover, the procompetitive effects of our conclusion generally will stimulate innovation in the market, offsetting any hypothetical reduction in innovation by the incumbent LECs.

* * *

284. We further conclude that, to the extent new entrants do not need access to all the proprietary information contained within an element in order to provide a telecommunications service, the Commission and the states may take action to protect the proprietary information. For example, to provide a telecommunications service, a new entrant might need access to information about a particular customer that is in an incumbent LEC database. The database to which the new entrant requires access, however, may contain proprietary information about all of the incumbent LECs' customers. In this circumstance, the new entrant should not have access to proprietary information about the incumbent LEC's other customers where it is not necessary to provide service to the new entrant's particular customer. Accordingly, we believe the Commission and the states have the authority to protect the confidentiality of proprietary information in an unbundled network element, such as a database, where that information is not necessary to enable a new entrant to offer a telecommunications service to its particular customer.

285. Section 251(d)(2)(B) requires us to consider whether the failure to provide access to an element would "impair" the ability of a new entrant to provide a service it seeks to offer. The term "impair" means "to make or cause to become worse; diminish in value."[605] We believe, generally, that an entrant's ability to offer a telecommunications service is "diminished in value" if the quality of the service the entrant can offer, absent access to the requested ele-

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[605] *See* Random House College Dictionary 665 (rev. ed. 1984).

ment, declines and/or the cost of providing the service rises. We believe we must consider this standard by evaluating whether a carrier could offer a service using other unbundled elements within an incumbent LEC's network. Accordingly, we interpret the "impairment" standard as requiring the Commission and the states, when evaluating unbundling requirements beyond those identified in our minimum list, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network.

286. We decline to adopt the interpretation of the "impairment" standard advanced by most BOCs and GTE. Under their interpretation, incumbent LECs must provide unbundled elements only when the failure to do so would prevent a carrier from offering a service. We also reject the related interpretations that carriers are not impaired in their ability to provide a service if they can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from a LEC. In general, and as discussed above, section 251(c)(3) imposes on incumbent LECs the obligation to offer on an unbundled basis all network elements for which it is technically feasible to provide access. We believe the plain language of section 251(d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by subsection 251(c)(3), but they do not require us to do so. The standards set forth in section 251(d)(2) are minimum considerations that the Commission shall

take into account in evaluating unbundling requirements. Accordingly, we conclude that the statute does not require us to interpret the "impairment" standard in a way that would significantly diminish the obligation imposed by section 251(c)(3).